IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
JUDGES: MARK J. CAVANAUGH, KATHLEEN JANSEN AND HILDA GAGE

FLUOR ENTERPRISES, INC.

Plaintiff/Appellee/Cross-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant/Appellant/Cross-Appellee.
_____/

Supreme Court Case No. 129149

Court of Appeals Case No. 251005

Court of Claims Case No. 02-27-MT

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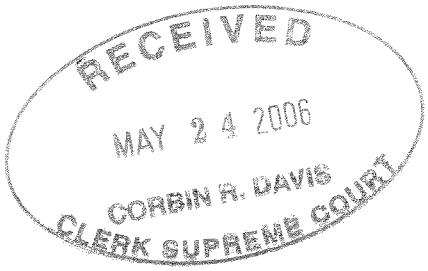
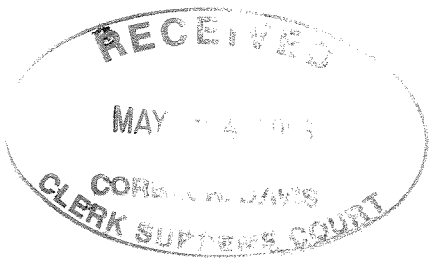
FLUOR ENTERPRISES, INC.'S CROSS-APPELLANT'S BRIEF





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QUESTIONS PRESENTED

1. MCL 208.53(c) ("Section 53(c)") provides that "[r]eceipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts." In its April 14, 2005 Opinion in this case, the Court of Appeals held that Section 53(c) attributes to Michigan receipts for "planning," wherever that planning occurs, "design," wherever that design occurs, and "construction activities within this state." The Court of Appeals held that this interpretation of Section 53(c) violated the Commerce Clause of the U.S. Constitution. Is the Court of Appeals' interpretation of Section 53(c) incorrect when it: (1) is not in accord with the plain language of the statute; (2) is not in accord with established rules of statutory construction; and, (3) results in a constitutional infirmity?

   The Court of Appeals answered "No."

   Plaintiff/Appellee/Cross-Appellant answers: "Yes."

   Defendant-Appellant has not addressed this question.

2. Does Section 53(c) prevent Defendant-Appellant from characterizing, as Michigan sales, receipts of Plaintiff-Appellee from planning and design services rendered outside Michigan if Section 53(c) provides that the only receipts that can be attributed to Michigan are those derived from "services performed for planning, design, or construction activities within this state" and the parties have stipulated that the services in question were performed outside of Michigan?

   The Court of Appeals answered: "No," but found the result unconstitutional.

   The Court of Claims answered: "Yes."

   Plaintiff/Appellee/Cross-Appellant answers: "Yes."

   Defendant/Appellant/Cross-Appellee answers: "No."

3. If Section 53(c) is ambiguous, should Plaintiff/Appellee/Cross-Appellant's interpretation of Section 53(c) be accepted because ambiguities in taxing statutes are to be resolved in favor of the taxpayer?

   The Court of Appeals did not decide this issue.

   The Court of Claims did not decide this issue.

   Plaintiff/Appellee/Cross-Appellant answers: "Yes."

   Defendant/Appellant/Cross-Appellee answers: "No."

I. INTRODUCTION

This case concerns Michigan single business tax ("SBT") imposed upon Plaintiff/Appellee/Cross-Appellant, Fluor Enterprises, Inc. ("Fluor"), by Defendant/Appellant/ Cross-Appellee, the Michigan Department of Treasury (the "Department") for fiscal years ending October 31, 1989 through October 31, 1994 (the "Years in Issue"). Fluor is a multinational engineering, construction, and technical service company. During the Years in Issue, Fluor was a California corporation with its principle place of business in Irvine, California.

Fluor performed engineering, construction material procurement, construction management, and architectural design work outside of Michigan for some projects that were constructed in Michigan. Some of the receipts received by Fluor for other projects related to activities performed in Michigan. These receipts were reported by Fluor as Michigan receipts for SBT apportionment purposes and are not an issue in this case.

The receipts at issue in this case are receipts received by Fluor for engineering and architectural services performed by Fluor employees outside of Michigan that related to real estate improvement projects constructed in Michigan (the "Subject Receipts"). The Department claims that the Subject Receipts must be attributed to Michigan because that is the state in which the project was constructed. Fluor's position is that such receipts must be attributed to the state in which the engineering and architectural services were performed.

The issue in this case is the proper application of Section 53(c) of the Michigan Single Business Tax Act ("SBTA"), MCL 208.53, to the activity of Fluor. Under the plain language of Section 53(c) of the Michigan Single Business Tax Act,[1] 208.53(c) ("Section 53(c)"), Fluor's receipts from services performed outside Michigan cannot be considered as Michigan receipts.

[1] MCL 208.1 *et seq.*

Nevertheless, the Department claims that SBTA §53(c) allows the Department to attribute to Michigan, as "Michigan sales," receipts Fluor derived from services performed outside Michigan.

On April 14, 2005, the Court of Appeals issued a published Opinion (the "Court of Appeals Opinion") interpreting Section 53(c) and holding that Section 53(c) is unconstitutional. *See Fluor Enterprises, Inc. v Dep't of Treasury*, 265 Mich App 711; 697 NW2d 539 (2005) (App at 30a). The Court of Appeals Opinion is clearly erroneous.

Section 53(c) provides the rules for determining whether a sale of services is a "Michigan sale" for Michigan Single Business Tax ("SBT") purposes. That section provides:

> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Fluor believes, and the Court of Claims below held, that Section 53(c) means what it says -- that receipts for certain activities performed "within this state" shall be deemed Michigan receipts. Effectively, the Court of Claims interpreted Section 53(c) as meaning:

> Receipts derived from services performed for planning . . . activities within this state shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . design . . . activities within this state shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . construction activities within this state shall be deemed Michigan receipts.

Thus, under the Court of Claims' interpretation, receipts derived from planning activities, design activities, and construction activities are deemed Michigan receipts only if the activities occur in this state.

The Court of Appeals, however, reversed the Court of Claims and held that the term "within this state" modified only the phrase "construction activities." 265 Mich App at 721. The Court of Appeals below interpreted Section 53(c) as meaning:

> Receipts derived from services performed for planning . . . shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . design . . . shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . construction activities within this state shall be deemed Michigan receipts.

The Court of Appeals then held that Section 53(c), as so interpreted, was unconstitutional because it attributed to Michigan, and any other state having a statute identical to Section 53(c), receipts for planning and design, regardless of where such planning and design take place. Such a result is unconstitutional because it would result in unfair apportionment of taxes upon multi-state taxpayers. 265 Mich App 729-730.

The Court of Appeals' interpretation of Section 53(c) is clearly incorrect. The phrase "within this state," like the term "activities," clearly modifies the preceding terms "planning," "design," and "construction." Reading Section 53(c) in this manner is in accordance with the plain language of Section 53(c), in accordance with established rules of statutory construction, and eliminates the unconstitutionality of the statute found by the Court of Appeals. For this reason, Fluor believes the Court of Appeals' Opinion was erroneous.

II. STATEMENT OF FACTS

A. Facts.

The parties agreed to and submitted a Stipulation of Facts ("SOF") in this matter. A copy of the SOF is contained in Fluor's Appendix **(11a)**.

This case concerns SBT imposed upon Fluor by the Department for fiscal years ending October 31, 1989 through October 31, 1994 (the "Years in Issue"). Fluor is a multinational engineering, construction, and technical service company. **(12a, ¶ 4.)** During the Years in Issue, Fluor was a California corporation with its principle place of business in Irvine, California. **(12a, ¶ 1.)**

The receipts at issue are received by Fluor for engineering and architectural services performed by Fluor employees outside of Michigan that related to real estate improvement projects constructed in Michigan (the "Subject Receipts").[2] **(12a, ¶¶ 5, 7.)** The Subject receipts do not relate to receipts from engineering or architectural design activities within the state of Michigan. **(12a, ¶¶ 7, 8.)** Instead, the subject receipts are for planning and design activities that took place outside of Michigan for projects that were later constructed in Michigan. **(12a - 13a, ¶¶ 7, 9.)**

Fluor timely filed its SBT annual returns for the Years In Issue. **(13a, ¶ 10)** In its returns for the Years In Issue, Fluor did not attribute to Michigan, as Michigan sales, the Subject Receipts because these receipts were received for activities that occurred outside the state of Michigan. **(13a, ¶ 11.)**

The Department audited Fluor. **(13a, ¶ 12.)** During the audit, the Department's auditor asserted that SBTA §53(c) allowed the Department to consider the Subject Receipts as "Michigan sales." **(13a, ¶ 12.)** Following the audit, the Department issued Fluor three Bills For Taxes Due (Intents to Assess) for the Years In Issue (the "Intents to Assess"). **(13a, ¶ 13.)** The Intents to Assess were based on the Department's position that the Subject Receipts should be reported as Michigan sales.

After receiving the Intents To Assess, Fluor requested an informal conference with the Department's Hearings Division. **(13a, ¶ 14.)** This informal conference was conducted on May 25, 1999 by Hearing Referee Kimberly Burzych, an attorney at law employed by the Hearings Division of the Department. **(14a, ¶ 15.)**

Following the informal conference, the Department's Referee issued a Recommendation that all three Bills should be cancelled in their entirety. **(14a, 16a-21a.)**. In her Recommendation, the Referee adopted Fluor's interpretation of SBTA §53 and determined that the Subject Receipts could not be considered "Michigan sales" for SBT apportionment purposes.

On October 23, 2001, the Commissioner of Revenue issued a Decision and Order of Determination directing that the Bills be assessed as originally determined. **(14a, ¶ 17, 22a-26a.)** On November 5, 2001, the Department issued to Fluor three Bills for Taxes Due (Final Assessments) for tax and interest of $343,340.96. **(14a, ¶ 18.)**

On December 3, 2001, Fluor paid these Bills for Taxes Due (Final Assessments) under protest and subsequently brought this suit to recover $346,418.31[3] in tax and interest paid under protest for the Years In Issue plus additional statutory interest, costs and attorney fees. **(21a, ¶¶ 19-21.)**

B. Statutory Provisions.

Michigan SBT is imposed upon any taxpayer "doing business" in Michigan. MCL 208.31. This includes companies that do all their business in Michigan as well as companies, like Fluor, whose business activity is predominantly outside Michigan.

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[2] Fluor also performed some services within Michigan, and the receipts from those activities were reported by Fluor as Michigan sales and are not at issue in this case. **(12a, ¶ 6.)**

[3] Subsequent to the issuance of the Final Assessments, the Department assessed Fluor an additional $3,077.35, which Fluor also paid under protest.

In order to determine the proper SBT for a multistate taxpayer, the tax base must be apportioned to Michigan. MCL 208.41. MCL 208.45 provides an apportionment formula, which develops a percentage by comparing a taxpayers sales, property and payroll in Michigan and everywhere.

The issue in this case concerns Fluor's "sales factor," which is the ratio of Fluor's "Michigan sales" divided by its total sales. MCL 208.51(1) provides: "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year."

MCL 208.53 provides the rules for determining whether a taxpayer's sales of services are "Michigan sales." That section provides:

> Sec. 53. Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

The dispute in this case concerns the interpretation of the last subpart of this statutory provision, Section 53(c).

C. Procedural History.

The Court of Claims below agreed with Fluor that the plain language of Section 53(c) only attributed receipts for certain activities to Michigan if those activities occur within Michigan. The Court of Claims' reasoning was so cogent that Fluor quotes it in full for the Court's benefit:

> The Court notes that when reviewing a statute, the Court must first begin with the plain language of the statue itself . . . in order to ascertain the legislature's intent in enacting it. And upon a plain reading of subsection (c) of MCL 208.53, one comes away with the impression that receipts from services performed within this state for construction projects in Michigan are to be deemed Michigan receipts.
>
> In order to adopt the interpretation advocated by the Department in this matter, one would have to literally rewrite the statute, as Plaintiff has alleged, to read: Receipts derived from planning, design, and construction activities for construction projects located within this state shall be deemed Michigan receipts.
>
> It defies logic that, if this way was truly what the legislature would have intended, that they would have enacted section 53(c) in its present form.
>
> The interpretation adopted by the Department in this case is simply not tenable in the Court's eyes, and the plain language of the statute itself just doesn't support this interpretation of the statute.

(27a, at 18-19.)

The Court of Appeals, however, reversed the Court of Claims. The Court of Appeals held that Section 53(c) attributed to Michigan receipts for activities that occurred outside of Michigan and that such a result rendered Section 53(c) unconstitutional.

III. STANDARD OF REVIEW

The proper interpretation of a statute is a question of law that the Court reviews *de novo*. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 72 (2000). Likewise, because the Court of Claims granted summary disposition, *de novo* review is appropriate. *Spieck v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

IV. ARGUMENT

A. Section 53(c) Only Attributes To Michigan Receipts For Services Performed Within Michigan.

Section 53(c) clearly only requires revenues received from planning or design services performed "within this state" to be included in the sales factor as Michigan sales. The statute

refers to "services performed for planning, design or construction activities within this state." This can only be read to refer to planning activities within this state, design activities within this state, or construction activities within this state. The parties stipulated that the receipts at issue in this case were derived from planning and design activities that occurred outside the state. Therefore, they are not within the scope of Section 53(c).

Indeed, the Department's own hearing referee adopted this construction of §53(c) in her Recommendation to the Revenue Commissioner. **(20a.)** The Hearing Referee determined:

> [I]t is clear that the Legislature intended "within this state" to modify more than just "construction activities"; instead, the Legislature intended "within this state" to modify the entire phrase "planning, design, or construction activities". In fact, "activities" (like "within this state") modifies more than just "construction"-it, too, modifies the entire list. This Hearing Referee agrees with Fluor's interpretation of the statute. As argued by Fluor, MCL 208.53(c) should be read as "receipts derived from services performed within Michigan (for planning, design, or construction activities)".
>
> If the Legislature wanted only construction activities modified by "within this state", it would have written (c) differently. For instance, it could have been drafted in the following manner: "receipts derived from services performed for construction activities within the state, or for planning activities, or for design activities shall be deemed Michigan receipts." It seems obvious that such an interpretation – deeming receipts derived for planning activities outside Michigan as Michigan receipts – was not desired.

(20a.)

The Referee's interpretation of Section 53(c) is clearly correct. The same interpretation was adopted by the Court of Claims below, which held "upon a plain reading of subsection (c) of MCL 208.53, one comes away with the impression that receipts from services performed within this state for construction projects in Michigan are to be deemed Michigan receipts." **(27a at 18.)** Under the correct interpretation of Section 53(c), receipts derived from planning activities,

design activities, and construction activities are deemed Michigan receipts only if the activities occur in this state.

B. The Court of Appeals' Interpretation of Section 53(c) Was Incomplete And Erroneous

The Court of Appeals held that the phrase "within this state" in Section 53(c) only modifies the immediately preceding phrase "construction activities." Therefore, the Court of Appeals held that Section 53(c), which provides that "Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts," should be interpreted as follows:

> Receipts derived from services performed for planning . . . shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . design . . . shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . construction activities within this state shall be deemed Michigan receipts.

The Court of Appeals' interpretation is at odds with established rules of grammatical and statutory construction because the word "activities" clearly modifies the terms "planning, design, or construction." The terms "planning, design, or construction" are clearly meant to go together because they are all similar terms. Furthermore, the fact that "activities" is in the plural form is evidence that the word is meant to apply to more than one type of activity (in this case, planning activity, design activity, and construction activity).

The Court of Appeals holding that the word "activities" only modifies the term "construction" is incorrect for several reasons. First, the word "activities" is plural and can therefore be naturally read to encompass more than one type of activity. Therefore, a conclusion that the word "activities" is modified by only the word "construction" is at odds with the language of Section 53(c). Second, as the Court of Appeals noted, "[t]he last antecedent is the

last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." 265 Mich App at 721. (emphasis added). A holding that the word "activities" is modified by the preceding phrase "planning, design, or construction" would therefore be in accord with the "last antecedent rule" employed by the Court of Appeals in its Opinion because the phrase "planning, design, or construction" is the phrase immediately preceding the word "activities."

The Court of Appeals' interpretation deems, as Michigan receipts, receipts performed for "planning," without regard to where the planning occurs, and "design," without regard to where the design occurs, but only attributes receipts for "construction activities" to Michigan if they occur within Michigan.[4] Further, such a reading destroys the parallel grammatical construction of Section 53(c) because it deems, as Michigan receipts, receipts derived from "planning" (a gerund), "design" (a verb or a noun but in this sense more naturally read as a verb), and "construction activities" (a compound noun). On the other hand, interpreting Section 53(c) as advocated by Fluor results in a parallel grammatical construction because Section 53(c) would deem, as Michigan receipts, receipts derived from "planning activities" (a compound noun), "design activities" (a compound noun), and "construction activities" (a compound noun).

C. The Court of Appeals' Approach To Statutory Construction Leads To Absurd Results.

The Court of Appeals below mechanically interpreted the so-called "last antecedent rule" as meaning that a word or phrase can only modify the immediately preceding word. See 265

[4] As noted in the Court of Appeals' Opinion, the result is also blatantly unconstitutional. The Court should not presume the Legislature intended to enact an unconstitutional law. *See People v Hackett*, 421 Mich 338, 347, n1; 365 NW2d 120 (1984).

Mich App at 721-722. Such an approach is not only at odds with the language of the rule[5] but also produces absurd results. Take, for example, the sentence in the Court of Appeals' Opinion, which states:

> The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentences. 265 Mich App at 721.

If one were to mechanically apply the "last antecedent rule," such that words or phrases only modify the immediately preceding word, then one would read this sentence to mean that the "last antecedent" is the "last word," or the "last phrase," or the "last clause that can be made an antecedent without impairing the meaning of the sentence." This result is clearly absurd, and is not a correct application of the rule.

If other Courts follow the approach used in the Court of Appeals' published opinion in this case, more statutes will be interpreted in absurd ways and rendered unconstitutional. For example, consider what would happen if a court applied the reasoning of the Court of Appeals to Section 94(d) of the Michigan Use Tax Act, MCL 205.94(1)(d). The Michigan Use Tax Act generally imposes use tax upon the use, storage, or consumption of property in Michigan. See MCL 205.93(1). MCL 205.94(1)(d) provides an exemption from use tax for:

> Property that is brought into this state by a nonresident person for storage, use, or consumption while temporarily within this state, except if the property is used in this state in a nontransitory business activity for a period exceeding 15 days.

Mechanically assuming that the phrase "while temporarily in this state" only modifies the immediately preceding word ("consumption") would result in an exemption from use tax for property brought into the state by a nonresident person for: (1) "storage," (2) "use"; or (3)

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[5] As correctly announced by the Court of Appeals, the rule requires that "[t]he last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Opinion at 6 (emphasis added).

"consumption while temporarily in this state." This reading would therefore exempt from use tax property brought into the state by nonresidents for non-temporary storage or use. In *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 253; 621 NW2d 450 (2000), however, the Court of Appeals noted that the legislative intent of this exemption was to allow that "[n]onresidents temporarily within the State, may bring in personalty for use in Michigan without incurring the tax." A more natural reading of MCL 205.94(1)(d) would be that the phrase "while temporarily in this state" modifies the immediately preceding phrase "storage, use, or consumption," just as a natural reading of Section 53(c) is that the term "activities" modifies the immediately preceding phrase "planning, design, or construction."[6]

D. Interpreting Section 53(c) In The Manner Advocated By Fluor Renders the Statute Constitutional.

Courts have a duty to interpret Section 53(c) such that the phrase "within this state" modifies the immediately preceding phrase "planning, design, or construction activities" because doing so avoids the constitutional violation found by the Court of Appeals. In the Opinion, the Court of Appeals held that Section 53(c) violated the Commerce Clause's requirement of fair apportionment. 265 Mich App at 729-730. The Court of Appeals analyzed

[6] Fluor could give many similar examples of absurdities that would result in interpreting statutes in the manner adopted by the Court of Appeals below in its published opinion. For example, MCL 32.551 provides that the Governor may "order to active state service any members of the organized militia . . . in time of public danger, disaster, crisis, catastrophe or other public emergency within this state." Interpreting the term "within this state" to only modify the immediately preceding phrase "other public emergency" would give the Governor authority to order the militia into action whenever there is a "public danger, disaster, crisis or catastrophe" anywhere in the world or if there is a "public emergency within this state." It is clear, however, that the phrase "within this state" is meant to modify all the preceding terms in MCL 32.551.

Section 53(c) under the internal consistency test of fair apportionment required by the United States Supreme Court and held that if Section 53(c) was adopted by more than one jurisdiction, a multi-state taxpayer's business activity would be included in the sales factor of more than one jurisdiction. 265 Mich App at 729-730. The Court of Appeals' internal consistency analysis was undoubtedly correct, because, if the word "activities" does not modify the clause "planning, design, or construction," every state that enacted Section 53(c) would claim, as in-state receipts, receipts derived from services performed for planning and design activities, regardless of the state in which the activities occurred. Thus, each state would claim all receipts for planning and design activities, resulting in duplicative taxation and unconstitutionally putting interstate commerce at a competitive disadvantage. 265 Mich App at 729-730. However, interpreting Section 53(c) in the manner suggested by Fluor removes this constitutional infirmity because Section 53(c) would source to Michigan only receipts for activities that occur within Michigan.

To determine whether imposition of a state tax would violate the Commerce Clause, one must apply the four-prong test announced in *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977). Under *Complete Auto*, a state tax does not satisfy the Commerce Clause unless all of the following requirements are met: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; **and** (4) the tax is fairly related to services provided by the state. The Department's position regarding §53(c) would violate the first three prongs of this test.

If the Department's position was accepted, the result would be to impose tax upon activities that do not have a substantial nexus with Michigan. Both the Commerce Clause and the Due Process Clause require that a state have a connection, not only to the taxpayer it seeks to

tax, but to the activities it seeks to tax. *See Allied-Signal, Inc v Director, Division of Taxation*, 504 US 768; 112 S Ct 2251; 119 L Ed 2d 533 (1992) (stating that, in the case of a tax on an activity, "there must be a connection to the activity itself, rather than a connection only with the actor the state seeks to tax.") (emphasis added). The Department's position is a blatant attempt to increase tax on a multistate taxpayer by treating, as Michigan sales, receipts derived from activities conducted outside the state of Michigan, an attempt which the Constitution prohibits. Indeed, the Revenue Commissioner brazenly admitted that, under the Department's position, §53(c) is "interpreted as pulling in activities performed out of state. . . ." **(20a.)**

Indeed, the Department's position would run afoul of the U.S. Supreme Court precedent regarding the contact a taxpayer must have with a state in order to be subject to tax. Consider, for example, a situation in which Business A has no connection with Michigan other than providing planning and design services of the type at issue in this matter to Business B that is constructing a facility in Michigan. The Department's position regarding the meaning of §53 would require that the revenues of Business A, which is rendering planning and design services, be treated as Michigan receipts. Due to the absence of substantial nexus between Business A and the state of Michigan, this result clearly would be unconstitutional. *See Quill Corporation v North Dakota*, 504 US 298 (1992) (Commerce Clause requires a physical presence in a taxing state before a taxpayer can be held liable). Indeed, the Department has admitted that the Commerce Clause requires that a taxpayer have a physical presence in Michigan before SBT can be imposed. *See* Revenue Administrative Bulletin 1998-01 **(40a)**. The Department's position in this case is inconsistent with the position it advocates in RAB 1998-01 and contrary to Commerce Clause jurisprudence. Therefore, the Department's position cannot be sustained.

Secondly, the Department's position regarding §53, which would require Fluor to include the Subject Receipts in the Michigan sales factor numerator, would also violate the fair apportionment requirement outlined by the U.S. Supreme Court in *Complete Auto*. Specifically, §53 would cause an enhanced risk of, or actually result in, multiple taxation of interstate commerce. The risk of multiple taxation by a tax system renders the tax unconstitutional. *See American Trucking Ass'n v Scheiner*, 483 US 266, 284-286; 97 L Ed 2d 226; 107 S Ct 2829 (1987) (striking down a Pennsylvania tax due to the threat of multiple taxation of interstate commerce).

To ascertain whether a tax is fairly apportioned, it must be examined for both internal and external consistency. *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 158; 445 NW2d 428 (1989). Under this analysis, a tax is internally consistent if it is structured so that, if every state were to impose an identical tax, no multiple taxation would result. *Container Corporation of America v Franchise Tax Board*, 463 US 159; 103 S Ct 2933; 77 L Ed 2d 545 (1983). If §53 means that a state can characterize as a local sale receipts for planning or design services, regardless of where those activities take place, then every state with such a provision would claim those receipts. The resulting multiple taxation violates the internal consistency test of fair apportionment. Under such a regime, Fluor could be bound to report the same receipts in California, South Carolina, Illinois, Texas and Michigan.

The Department's position regarding §53(c) enhances the risk of multiple taxation. Section 53(a) clearly requires that receipts from business activity be sourced to Michigan if the "business activity is performed in this state." Were the Court to accept the interpretation of §53(c) urged by the Department, the state would have it both ways – it could tax out-of-state activity related to a Michigan construction project and could tax in-state activity related to an

out-of-state construction project. This potential clearly results in a violation of the internal consistency test and shows the Department's position is both inconsistent with SBTA §53(a) and results in a constitutional violation.

Third, as a consequence of this multiple taxation, §53(c) would also violate the third prong of the *Complete Auto* test by discriminating against interstate commerce. *See Armco Inc v Hardesty*, 467 US 638, 644; 81 L Ed 2d 540, 104 S Ct 2620 (1984) (a state tax that fails the internal consistency test is a form of discrimination against interstate commerce).

It is an established rule of statutory construction that where a statute is amenable to two differing interpretations, one which would render the statute unconstitutional and the other constitutional, the interpretation adopted *must* be the one that renders the statute constitutional. *See Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997); *Royal Auto Parts v Michigan*, 118 Mich App 284, 289; 324 NW2d 607 (1982). Indeed, the presumption of constitutionality may even justify a construction that is rather against a natural interpretation of the language used, if necessary to sustain the enactment. *Lowe v Corrections Department (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994).

Fluor has demonstrated that the Department's position causes §53 to reach an unconstitutional result. The Court should not conclude that the Legislature intended to enact a statute that infringes upon the Constitution. The position advanced by the Department must be rejected.

The Department blurs and misapplies the foregoing constitutional principles governing state taxation. For example, the Department argued below that the activity being taxed has a substantial nexus with Michigan "because the tax is being applied to Michigan projects like constructing the Midland Cogeneration plant and construction at a Marathon Oil refinery in

Detroit." This argument, however, is contrary to the Stipulation of Facts, which unambiguously states that receipts at issue are not for construction, but rather are for engineering and architectural services rendered outside Michigan. **12a, ¶¶ 7, 9.)**

The Department also errs in its analysis of the Commerce Clause's fair apportionment requirement. The Department misapplies the internal consistency test. The Department asserts that internal consistency is satisfied "because if all states employed a tax identical to the SBT there would be no overlapping of taxes," without explaining how this could be so. The assertion is clearly incorrect, because the states in which Fluor rendered its engineering and architectural services would claim the receipts from those services under the plain language of §§53(a) and (c), while Michigan would claim those same receipts as Michigan sales under §53(c). Thus, there would be multiple taxation.

It is an established rule of statutory construction that where a statute is amenable to two differing interpretations, one of which would render the statute unconstitutional and the other constitutional, the interpretation adopted must be the one that renders the statute constitutional.[7] *See People v Neumayer*, 405 Mich 341, 362; 275 NW2d 230 (1979); *People v McQuillan*, 392 Mich 511, 536; 221 NW2d 569 (1974); *Royal Auto Parts v Michigan*, 118 Mich App 284, 289; 324 NW2d 607 (1982). "[W]henever possible, an interpretation that does not create constitutional invalidity is preferred to one that does." *Automotive Service Councils of Michigan*

[7] The same rule of construction is used by federal courts as well. *See, e.g., Edward J DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 US 568, 575; 108 S Ct 1392, 1397 (1988) ("[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); *NLRB v Catholic Bishop of Chicago*, 440 US 490, 500; 99 S Ct 1313, 1318 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v Holden*, 275 US 142, 148; 48 S Ct 105, 107 (1927) (opinion of Holmes, J.)

v Secretary of State, 82 Mich App 574, 600; 267 NW2d 698 (1978), citing *Schwartz v Secretary of State*, 393 Mich 42, 50; 222 NW2d 517 (1974). Indeed, the presumption of constitutionality may even justify a construction that is rather against a natural interpretation of the language used, if necessary to sustain the enactment. *Lowe v Corrections Department (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994) ("Where there is doubt, the presumption of constitutionality justifies a construction that is somewhat contrary to the natural interpretation of the language used, if necessary to sustain the law.").

E. Any Ambiguity In Section 53(c) Should Be Resolved In Fluor's Favor.

Further, taxation statutes must be strictly construed, and all doubt, uncertainty and ambiguity must be resolved in favor of the taxpayer. *Ford Motor Co v State Tax Comm'n*, 400 Mich 499, 506; 255 NW2d 608 (1977). An interpretation advocated by the taxpayer that is consistent with the statute must prevail. *See A. Z. Schmina & Sons, Inc. v Dep't of Treasury*, 203 Mich App 187, 191-92; NW2d 57 (1993). As demonstrated above, not only is Fluor's interpretation consistent with the language of the statute, it is consistent with constitutional requirements as well.

V. CONCLUSION AND REQUEST FOR RELIEF

There is no doubt that Section 53(c) is inartfully drafted. The Court of Claims, however, did as good a job as can be done interpreting Section 53(c) in accordance with its plain language to reach a constitutional result. The Court of Appeals' interpretation of Section 53(c) was incorrect and required a finding that Section 53(c) is unconstitutional. This Court can remedy that error by simply restoring the interpretation given to Section 53(c) by the Court of Claims.

Fluor respectfully requests that the Court grant this Application and, upon consideration, adopt the Court of Claims' interpretation of Section 53(c) or, in the alternative, peremptorily reverse the Court of Appeals and reinstate the judgment of the Court of Claims below.

Respectfully submitted,

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